

Vrnakova (Migration) [2023] AATA 3899 (15 November 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Milena Vrnakova
CASE NUMBER:	1933703
HOME AFFAIRS REFERENCE(S):	BCC2017/3175904
MEMBER:	Donna Petrovich
DATE:	15 November 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 15 November 2023 at 2:58pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – not in relationship for 12 months before application made – applicant left Australia and relationship ceased – application to withdraw review not signed by applicant – no evidence provided – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5CB(2), 65, 359(2)

Migration Regulations 1994 (Cth), rr 1.09A, 2.03A(3), Schedule 2, cl 820.211(2)(a), 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The visa applicant (the 'applicant' and 'review applicant') applied for the visa on 1 September 2017 on the basis of her relationship with her sponsor (the 'recipient'). At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant (the 'applicant') did not satisfy cl 820.211(2) of the Regulations. This is because the delegate was not satisfied that the applicant and sponsor were in a de-facto relationship for 12 months prior to the visa application. Further to this, the delegate found that cl 2.03A(3) of the Regulations was not met as material had not been provided justifying a waiver of the 12 month de facto relationship requirement based on compelling reasons.
4. The delegate found that it could not be established that the couple were in a de-facto relationship for a period of 12 months at the time of application and therefore did not meet cl 820.211(2) of the Regulations.

5. Background

6. On 1 August 2022, the Tribunal wrote to the sponsor, Mr George Josipovic, the authorised recipient seeking confirmation that the visa applicant (the applicant) wished to continue her review application given Departmental of Immigration and Border Protection (the 'Department') records showed that she had left Australia.
7. In an email dated 1 August 2022, Mr George Josipovic confirmed that the applicant wished to continue with the review and provided her email address.
8. On 2 May 2023 the Tribunal invited the applicant to attend a hearing scheduled for 16 August 2023.
9. On 22 June 2023 the sponsor emailed the Tribunal advising that the couple's relationship had ended and that they were no longer in a relationship.
10. In an email from the Tribunal dated 23 June 2023 to the recipient, confirming his advice that the couple's relationship had ended, requested the MR10 form (to withdraw the review) be completed and signed by the applicant, Milena Vrnakova. The Tribunal requested that the MR10 form be returned by 7 July 2023.
11. The MR10 form was returned under cover of an email dated 30 June 2023 to the Tribunal signed by the sponsor, Mr George Josipovic. But it was not signed, as required by the review applicant (the applicant).

12. Consequently, on 6 July 2023 the Tribunal emailed both the review applicant (the applicant) and the recipient requesting that Milena Vrnakova sign the MR10 form as the sponsor had advised the relationship had ended and wished to withdraw the review.
13. On 26 July 2023, the parties were notified that the hearing had been rescheduled to 31 August 2023. This rescheduled hearing was postponed by the Tribunal and the parties were advised of the postponement on 30 August 2023.
14. On 4 September 2023, the Tribunal sent the parties an email pursuant to s.359(2) of the Act, requesting information by 18 September 2023 supporting their claims that they are in a spouse or de facto relationship. This letter advised that failure to respond to the Tribunal request or to seek an extension of time by the 18 September 2023, would result in a loss of hearing rights.
15. The last communications from the recipient to the Tribunal in relation to this review were dated 22 June 2023 and 30 June 2023. The parties have not engaged with the Tribunal since. The parties did not provide any supporting information in relation to the s 359(2) request by the Tribunal, nor did they seek time extension to respond.
16. Further, a requested MR10 form signed by the review applicant, Milena Vrnakova, has not been received by the Tribunal
17. The Tribunal is satisfied that the applicant does not wish to proceed with the review application given George Josipovic's submission of 22 June 2023 advising that the couple's relationship has ceased. In the circumstances it is reasonable to conclude that the couple has not been in an ongoing and genuine relationship for some time.
18. For these reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

19. The issue in the present case is whether the review applicant (the applicant') was the de-facto spouse of the sponsor for 12 months prior to the visa application and whether the relationship is genuine and continuing (and not broken down).

SPOUSE/DE FACTO (cl 820.211(2)(a), (3)(e), (4)(e), (5)(e), (6)(d), cl 820.221)

Whether the parties are in a spouse or de facto relationship

20. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de-facto spouse of the sponsor who is an Australian citizen.
21. 'De facto partner' is defined in s 5CB of the Act and provides that a person is in a de facto relationship with another person if they are not in a married relationship for the purposes of section 5F with each other but they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, and the couple live together, or do not live separately and apart on a permanent basis; and they are not related by family: s 5CB (2)(a) - (d).
22. In forming an opinion about these matters, regard must be had to all circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the

parties' household and their commitment to each other as set out in reg 1.09A of the Regulations.

23. The applicant and sponsor claimed to be in a de-facto relationship at the time of application. However, they have not provided sufficient evidence to satisfy the Tribunal that the relationship was genuine and ongoing for 12 months prior to application for visa.
24. Moreover, the Tribunal was advised on 22 June 2023 by the sponsor that the couple's relationship had in fact ended and that he sought to withdraw the review.
25. Following this advice to the Tribunal on 22 June 2023 that the couple's relationship has ended, and the subsequent MR10 form signed by the recipient (sponsor) on 30 June 2023, no further communication has been received from either party to the review.
26. An MR10 form signed by the review applicant (the applicant) has not been received to enable the Tribunal to action a withdrawal of the review.
27. Of particular note, is the lack of response by the parties to the request for information supporting claims of a genuine de facto relationship pursuant to s. 359(2) of the Act.
28. It is the finding of the Tribunal that there is insufficient evidence to make a positive finding that the couple were in a genuine and continuing de facto relationship as required by s 5CB (2)(a) - (c) for 12 months prior to the application. This is particularly so as the recipient (sponsor) has advised the Tribunal in writing on 22 June 2023 that the couple's relationship has broken down and wished to withdraw the review.
29. On balance the Tribunal finds that the couple do not have a mutual commitment to shared life to the exclusion of all others; are not in a genuine and continuing relationship; and do not live together but live separately and apart on a permanent basis.
30. On the basis of the above the Tribunal is not satisfied that the requirements of s 5CB are met at the time the visa application was made and the time of this decision.
31. Therefore, the Tribunal finds that the applicant does not meet cl 820.211(2)(a) and cl 820.221.
32. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

33. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Donna Petrovich
Member